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Viewing cable 10NAIROBI11, Kenya: Inadequate Witness Protection Poses Painful Dilemma

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Reference ID	Created	Released	Classification	Origin
10NAIROBI11	2010-01-05 11:40	2011-08-30 01:44	SECRET	Embassy Nairobi

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SUBJECT: Kenya: Inadequate Witness Protection Poses Painful Dilemma

CLASSIFIED BY: Mitchell Benedict, Political Counselor, DOS, POL;

REASON: 1.4(B), (D)

[11](#). (U) This is an action request. Please see para 17.

12. (S) Summary: In recent months, post has noted an increased level of intimidation against witnesses to Kenya's late 2007-early 2008 post-election violence. This trend is consistent with security threats against other human rights defenders (HRDs) whose activities conflict with vested political interests. The government of Kenya (GOK) passed legislation establishing a witness protection program in 2006 but has yet to establish a functional program. Most experts are concerned that, even if implemented, the program will have critical vulnerabilities and be subject to political interference. Amendments have been proposed to the legislation to attempt to address these concerns. In 2007, civil society groups formed an ad hoc network to protect HRDs, but awareness and capacity are limited and the network has likely been penetrated by the Kenyan intelligence service. Our ability to assist HRDs is limited in both scope and duration, and has recently proved to be inadequate to fully support recent applicants. The number of non-HRD witnesses who will require long-term protection is likely to increase significantly, especially if the International Criminal Court (ICC) moves ahead with indictments against senior political leaders for their roles in the post-election violence. Robust action by Kenya's Truth Justice and Reconciliation Commission (TJRC), or much less likely Kenya's courts, could also act as triggers for threats against witnesses.

13. (S) Summary, continued: Inadequate witness and HRD protection mechanisms within the GOK and civil society -- and insufficient support for witness protection by the international community -- are major impediments to the prosecution of organizers of post-election violence, whether at the ICC or (much less likely) in Kenyan courts. A continued lack of witness protection will also inhibit the work of the TJRC. Therefore, we request additional resources (via the Human Rights and Democracy Fund or other appropriate mechanism) to support civil society in developing alternative witness protection/HRD protection networks. We also request that the Department examine the parameters of the existing Human Rights Defenders' Fund to determine whether additional resources can be made available, especially for witnesses or HRDs who require longer-term protection. To the extent legally possible we should be in touch with the ICC on this issue, and we should urge strong support by the EU and key member states for witness protection. End summary.

Increasing Threats and Extrajudicial Killings

14. (S) Kenya's government, political leaders, and criminal gangs have historically utilized intimidation and varying degrees of violence against opponents. During the post-election crisis period in early 2008, Kenya experienced extensive violence, returning to relative calm after the signing of the National Accord in February 2008. However, since the March 2009 killing of two directors of the Oscar Foundation (a local NGO which documented and publicized cases of extrajudicial killings by GOK security forces) by suspected members of a police death squad, we have noted a steady rise in the number of individuals threatened or killed for apparent political reasons. A number of witnesses who testified before the Commission to Investigate Post-Election Violence, also known as the Waki Commission, have already been threatened. Two classes of post-election violence witnesses are most vulnerable: ethnic Kalenjin witnesses in Rift Valley province, and ethnic Kikuyu witnesses to post-election violence in Nairobi and Central province, especially those with links to the Mungiki movement. However, due to the widespread and complex nature of the post-election violence, witnesses can come from all ethnic groups and walks of life, and unlike HRDs, are not part of a civil society network.

15. (S) Politically-motivated intimidation and violence in Kenya spans a broad spectrum of perpetrators and victims. After the Oscar Foundation murders, post helped four witnesses to relocate to Uganda after they were allegedly threatened by the police. Members

of Parliament and their staff who have sought to advance legislation to establish a local tribunal to try suspects implicated in post-election violence have received death threats.

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One parliamentarian's aide received a text message stating "u better stop associating with him...do you want we start counting your days also" two days before three suspects attempted to kidnap the aide. Since 2007, security forces have often used lethal and excessive force when apprehending suspected members of the Mungiki, an ethnic Kikuyu movement linked to various criminal activities, especially in Nairobi and Central province. In November 2009, Mungiki spokesman Njuguna Gitau was killed on a busy Nairobi street by suspects alleged to be undercover police officers. At the time of his death, Gitau was working to register a political party to represent Mungiki and youth interests. According to one source, Gitau may have been the lynchpin to channel funding from Uhuru Kenyatta to the Mungiki during the post-election violence.

16. (S) Of particular concern for Kenya's reform process are increasing threats to witnesses of the post-election violence. As the ICC prepares for potential prosecution of key organizers of the violence, multiple sources indicate that implicated political leaders, notably cabinet ministers William Ruto and Uhuru Kenyatta, are directing a campaign of intimidation against potential witnesses. The ICC has not yet launched a formal investigation into crimes committed during the post-election violence, but has already expressed concern about threats to witnesses. ICC representatives have met with GOK officials regarding lack of progress in establishing its national witness protection program. The ICC does not have its own witness protection program, but rather must rely on national programs to keep witnesses safe. Some NGOs have noted a clear connection between visits by Chief Prosecutor Moreno Ocampo and other ICC officials and subsequent intensifying pressure on witnesses. Kenya's TJRC has also expressed the desire to set up an independent witness protection unit, but has not taken any action to date and is itself suffering from a lack of agreement about its mandate (i.e. whether to focus on truth-finding, justice-seeking, or promotion of reconciliation). An additional update on the TJRC will be reported septel.

GOK Witness Protection Remains in Limbo

17. (S) Minister for Justice and Constitutional Affairs Mutula Kilonzo has publicly acknowledged receiving "bundles" of letters from post-election violence witnesses reporting intimidation, many of whom testified before the Waki Commission, and who have therefore already attracted unwelcome attention from post-election violence inciters and organizers. While Kilonzo notes that threats will complicate any prosecution of post-election violence suspects, he continues to argue that he is powerless to protect them and accuses Attorney General Amos Wako, who is responsible for oversight of the witness protection program, of failing to fulfill his duties. (Note: Wako was recently subjected to 212f visa sanctions for his role in several high-level corruption cases, and does not appear to feel any sense of urgency with regard to his witness protection mandate. Moreover, any witness protection program carried out under Wako would not be credible. Kilonzo's suggestion that he has no ability to realize implementation of the witness protection program is disingenuous at best. End note.)

18. (S) Since the Witness Protection Act was passed in 2006, the Witness Protection Unit (WPU) housed within the Attorney General's office has been officially "launched" at least four times, most recently in October 2009. The WPU, headed by prosecutor Alice Ondiyeki, now has staff and furnished office space, but has yet to accept a single witness for protection. To date, the current and former DOJ Resident Legal Advisors have provided technical

assistance with drafting the Act and numerous trainings to WPU staff, including the consultative visit of Heather Cartwright, a nationally-respected expert on witness protection. Judge Ann Williams, a judge from the Seventh Circuit Court of Appeal, has also provided training to prosecutors staffing the WPU. Currently, South African expert Gerhard van Rooyen is embedded within the WPU and is providing technical assistance. His position is funded by the UN Office on Drugs and Crime (UNODC).

¶9. (S) Under the Witness Protection Act, the WPU is under the authority of the Attorney General (AG). Security is provided by members of the Kenya Police Service, and the AG has to give

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approval for anyone to enter the program, although in practice he has devolved authority to select participants to Ondiyeki as head of the unit. The WPU is funded as a line item in the AG's budget, which is controlled by the Ministry of Justice.

¶10. (S) In a recent briefing to members of diplomatic missions in Nairobi, van Rooyen laid out his vision for Kenya's witness protection program. Van Rooyen's fundamental concern is that the WPU as it currently exists is too closely linked to the AG and security forces and therefore will not be able to provide politically neutral protection, especially to witnesses who could implicate senior government officials in serious crimes. Van Rooyen has drafted proposed amendments to the Witness Protection Act to overcome what he sees as fatal flaws in the existing legislation. The key elements of the amendment make the WPU independent of the Attorney General (and, by extension, the Ministry of Justice) and create an autonomous, dedicated police unit for witness security with the authority to carry weapons. Van Rooyen also cited the need for vetting and revetting of WPU staff, include polygraphing, to ensure autonomy and confidentiality.

¶11. (S) There are, however, two concerns with this approach: one is that under the GOK budgetary system, a completely independent body can be starved for finances (and therefore rendered impotent) unless it has a budget line and devolved authority over how to spend its finances. As van Rooyen pointed out, the requisite financial support demands concurrent political will to make witness protection work. He added that, given the length of time many witnesses might need to spend in the program, the government would need to fund witness and unit operating expenses for at least three years. Other such bodies, like the Office of the Ombudsman, have effectively been prevented from carrying out their mandate through successive budget cuts. The second concern is that the Police Commissioner and other senior law enforcement officials are likely to oppose the independent police unit, which could presumably be compromised by corruption or infiltrated by intelligence officials in the same way that existing police units could be compromised.

¶12. (S) An additional obstacle is that the AG and WPU staff now say they cannot admit anyone into the program or otherwise move forward with implementation until the amendment is either passed or rejected by Parliament, thus building in an automatic additional delay of several months. In November, the AG announced his intention to introduce the amendment to the cabinet and thence to Parliament, but it had not moved forward by the time Parliament adjourned on December 10.

Civil Society: Limited Capacity, Likely Compromised

¶13. (S) In November 2007, Kenya human rights NGOs established a national human rights' defenders network, supported by and in partnership with post and other like-minded missions. The HRD network, led by the NGO Kenya Human Rights Commission, has set up a network of referral points and safe houses. In 2009, the network provided protection to 51 at-risk individuals. The HRD network has not attempted to provide protection for non-HRD witnesses.

¶14. (S) An assessment of Kenya's HRD network conducted by the East and Horn of Africa HRD Project in October 2009 concluded that the network is hampered by a lack of capacity and funding, is largely unknown outside civil society circles, and has poor communication security procedures. Organizations active with the HRD network report that they have been monitored and/or threatened by agents of the Kenyan intelligence service. As a result, member organizations often reject applicants whose bona fides are unknown to them and do not widely publicize the existence of the network. Extensive use of cell phones by the HRD network and individuals under protection further compromises their safety as calls can be monitored by the GOK.

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Embassy Resources Inadequate

¶15. (S) Post's primary instrument for assisting at-risk HRDs is the Human Rights Defenders Fund, administered by Freedom House in coordination with the Bureau of Democracy Rights and Labor (DRL). While the Fund provides rapidly deployable funding to assist HRDs in-country or in the initial stages of relocation abroad, the relatively small amounts and one-off nature of the grants limit the utility of the Fund for HRDs with long-term protection needs. For example, post used the Fund to assist four witnesses to the Oscar Foundation murders to relocate to Uganda and apply for refugee status. Each witness received funding adequate for three months of living expenses. However, the government of Uganda took eight months to process their applications for refugee status (possibly due in part to domestic political sensitivities), during which time the witnesses were evicted from their housing and had no legal means of employment. All four ultimately returned to Kenya, where they remain at risk. Post's assistance to HRDs is also subject to surveillance. The Poloff responsible for the program has received two anonymous phone calls in which email correspondence to HRDs was cited and the officer was warned against continued support to the individuals.

Action Requests

¶16. (S) An apolitical, confidential state-run witness protection program is ultimately the best long-term solution for Kenya. However, this is not a viable possibility in the short to medium term. We are concerned that lives are at risk in the interim. Any decisive forward action by the ICC will substantially increase already significant pressure on witnesses. The TJRC will prove ineffective, whether the desired end-state is truth, justice, or reconciliation, unless it can create a safe environment for witnesses and victims to come forward.

¶17. (S) First, in order to formulate effective support for witness protection in Kenya, we need to know more about the ICC's plans and what it is prepared to do in this arena. We request the Department to consider contacts with ICC interlocutors via the Department, Embassy Nairobi and The Hague about their game plan for witness protection, including the number and type of witnesses they would likely present, which witnesses would need protection and for how long, and whether there are high-priority witnesses with "smoking

gun" evidence or whether the cases will rest on circumstantial evidence from many witnesses. Second, we request that the Department examine the parameters of the existing Human Rights Defenders' Fund to determine whether additional resources can be made available, especially for witnesses or HRDs who require longer-term protection, and explore other mechanisms as well. Third, we are discussing these issues with the EU and key member state colleagues in Nairobi (especially the British, French, Dutch, and Nordics), and suggest the Department consider appropriate demarches.

RANNEBERGER